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Supreme Court, U.S.
FILED

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08-313 SEP 4 - 2008

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EUGENIO NAVARRO, PETITIONER

v.

BRONEY AUTOMOTIVE REPAIRS, INC., STEPHEN ROMNEY, TILDEN TOTAL CAR CARE CENTER, ANTHONY BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the United States Court of Appeals for the Eleventh Circuit erred in its ruling in direct conflict with the United States Supreme Court ruling in Walling vs. Jacksonville Paper Co., 317 U.S. 564 (1943), concluding that petitioners activities merely affected and did not sufficiently affect interstate commerce pursuant to 29 U.S.C. § 207(a)(1) so as to bring Petitioner under the overtime wage protection of the Fair Labor Standards Act.

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PETITION FOR WRIT OF CERTIORARI

Eugenio Navarro ("Navarro") petitions for a writ of certiorari to review an opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated June 6, 2008, is officially reported as Navarro v. Broney Auto. Repairs, Inc., 2008 U.S. App. LEXIS 12346 (11th Cir. Fla. June 6, 2008), and is reproduced at App. 1a- 11a. The decision of the Southern District of Florida is reproduced at App.12a-27a.

JURISDICTION

The petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days of the 11th Circuit Court of Appeals affirming the Southern District of Florida's decision granting Defendant's motion for summary judgment.

RELEVANT PROVISIONS INVOLVED

The relevant statutory provisions involved are 29 U.S.C. § 207 (a)(1) of the Fair Labor Standards Act.

Section 207 (a)(1) of the FLSA, maximum hours (29 U.S.C. § 207 (a)(1))

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions.

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Petitioner was employed by Appellees as a commercial automobile repair/garage worker and is therefore governed by the Fair Labor Standards Act. Petitioners regular job duties, involved the pick-up and delivery of auto-parts from various auto parts suppliers that were manufactured outside the state of Florida. Appellant also regularly installed those auto-parts into Appellees' customers' vehicles who where the ultimate consumers. Appellant seeks to recover overtime wages under the Fair Labor Standards Act 29 U.S.C. Sections 201-216 in accordance with the Amended Complaint.

The District Court entered an Order granting Appellee's Motion for Summary Judgment finding no FLSA jurisdiction. Thereafter, the Court granted Final Judgment in Appellees' favor. The Eleventh Circuit Court of Appeals affirmed the District Courts ruling finding that Appellant's activities merely affected and did not implicate interstate commerce pursuant to 29 U.S.C. § 207(a)(1) and that the overtime wage

provisions of the Fair Labor Standards Act did not apply to Petitioner.

REASONS FOR GRANTING THE PETITION

I. THE INTERSTATE JOURNEY OF GOODS DOES NOT CEASE TO FLOW IN COMMERCE UNTIL THE GOODS HAVE REACHED THEIR FINAL DESTINATION AND THEREFORE ALL INDIVIDUALS WHO HANDLE THESE GOODS DURING FLOW THROUGH COMMERCE ARE INDIVIDUALLY COVERED UNDER 29 U.S.C. § 207(A)(1) OF THE FAIR LABOR STANDARDS ACT.

Pursuant to 29 U.S.C. Sec.207(a)(1), workers are entitled to one and one half times their regular hourly rate for any hours worked per week in excess of forty hours. Congress created two types of coverage under the Fair Labor Standards Act: (1) "individual coverage" and (2) "enterprise" coverage. *Dunlop v. Industrial America Corp.*, 516 F. 2d 498, 500-501 (5th Cir. 1975). In the present case, for the purposes of this Petition, Petitioner proceeds under the theory of individual coverage.[1]

---

[1] Appellees 2005 and 2006 late filed Tax Returns attached to Appelleess Motion to Dismiss/Summary Judgment indicate such were signed on 4/1/07. As set forth in Appellees' Accountant's deposition taken on 10/11/07. Appellees filed both their 2005 and 2006 corporate tax returns in 2007. Deposition of Ben Rogatinsky, P12, L15-20. Appellees' accountant testified that he compared Appellees' rolling forward sales, but did not look to any backup documentation to substantiate in preparation. Deposition of Ben Rogatinsky, P13, L16-25. Also, the accountant never did anything to "verify the accuracy" of the numbers provided by Appellee

In an unpublished opinion, the Eleventh Circuit in *Alonso v. Garcia*, 147 Fed. Appx. 815, 816 (11th Cir. 2005), citing *Brennan v. Wilson Bldg, Inc.*, F.2d 1090, 1095 (5th Cir. 1973) compared the pick up and delivery of poisons manufactured out of State from local distributors by an exterminator to the case in Brennan, where "elevator operators who transported passengers delivering interstate mail, parcel post, and freight "engaged in commerce" because the goods they transported continue to flow in interstate commerce until delivered to the tenants of the building in which the elevators were operated" *Id.* at 1095. The Court in Brennan, seemed to interpret the Supreme Court decision in *Walling v. Jacksonville Paper Co.* 317 U.S. 564 (1943) that the "interstate journey of the goods did not end, and the goods thus did not cease to flow in commerce, until they reached their final destination—the retail stores" quoting Jacksonville Paper Co. at 568 "there is a practical continuity of movement of the goods until they reach the customers for whom they are intended" *Brennan* at 1095.

Petitioner indicated in his Affidavit that his weekly/daily work duties included on a regular basis the following: replace/install brakes, belts/hoses, water pumps, alternators, starters, spark plugs, brake pads, brake rotors, air filters, struts, sparkplug wires, mufflers, power steering pumps, wiper blades and oxygen sensors on all brands of foreign/domestic cars;

Romney. Deposition of Ben Rogatinsky, P11, L6-8. Further, the accountant was unable to even testify as to what Appellees' total gross income was in 2005 and 2006. Deposition of Ben Rogatinsky, P14, L19-25; P15, L1-15. Recently, through August of 2007, Appellees' corporate gross income was $202,018.71. Deposition of Ben Rogatinsky, P16, L3-8.

change the oil on all brands of foreign/domestic cars. Petitioners Affidavit further stated that while working for Appellees he used, organized, prepared and handled on a constant and/or continual basis etc. various auto parts set forth on a List of Parts and Manufactures signed by Petitioner. That List of Parts and Manufactures indicates that he installed on a regular basis the following interstate goods into the vehicle: alternators from Michigan, starters from Georgia, spark plugs from Germany, brake pads and rotors from Mexico, air filters from Mexico, serpentine belts from Nebraska, water pumps from Georgia, struts from Wisconsin, sparkplug wires from Memphis Tennessee, control arms from Michigan, mufflers from Brentwood Tennessee, power steering pumps from Germany, wiper blades manufactured in Korea and distributed from a company in Cleveland Ohio, and oxygen sensors from Germany. Appellant further qualified in his Affidavit that he installed/replaced the materials/parts that were supplied to him by Appellees, as listed in the List of Parts and Manufactures, in the cars of the Appellees' Customers. Petitioner also testified in his Affidavit that "I would pick up the materials listed, ordered by Stephen Romney and Anthony Brown, from various places such as Discount Auto Parts and Bennett Auto Parts."

In *Alonso v. Garcia*, 147 Fed. Appx. 815, 816 (11th Cir. 2005), the trial court failed to acknowledge the fact that the employee qualified for individual coverage under the FLSA. The *Alonso* Court stated that in determining individual coverage, ""engaged in commerce" phrase "is to be given a broad, liberal construction" and individual coverage does not require duties involving transportation outside of Florida. *Id.*

Following the reasoning outlined by the Brennan Court, as mentioned supra, based upon the Supreme Court decision in Jacksonville Paper Co., the materials and chemicals used by Alonso, which had traveled in interstate commerce, continued to flow in interstate commerce until they reached Defendants customers.

Given the wide range of auto parts which flowed from outside the State of Florida that Petitioner installed in the vehicles of Appellees' customers', such is no different than the Plaintiff in *Alonso* who in the course of rendering pest extermination services utilized "materials and chemicals" that traveled in interstate commerce that he picked up at local distributors. *Alonso*, 147 Fed. Appx. at 816. Generally speaking, any regular contact with commerce, even if it is small, will result in an employee being covered by the FLSA. No de minimus rule applies. *Marshall v. Victoria Transp. Co.*, 603 F.2d 1122, 1124 (5th Cir. 1979). However, it is clear in the instant case that Petitioner had even more involvement in the flow of interstate commerce than the employee in *Alonso* or *Brennan* given the wide range of out of state parts installed by Petitioner, and the fact that Petitioner picked up those parts at different locations and delivered them to Appellees' place of business. The facts in the instant case are very comparable to both *Alonso* and *Brennan* decisions.

In the case at bar, Appellees were not the ultimate consumers of the auto parts that Petitioner delivered to Appellees' place of business and installed into the customers' vehicles. The ultimate consumers were obviously Appellees' customers and not Appellees business or the auto parts store from which Appellees

purchased these parts. These individuals who would come to Appellees place of business in order to have their vehicles repaired with auto parts that Appellees had obtained for that specific purpose were and are the ultimate consumers. In the instant case, the Petitioner did not merely use some tools that may have originated from out of state, but rather regularly picked up various out of state auto parts (products crucial and central to Appellees' auto business) and delivered them to Appellees' place of business, and thereafter installed such out of state goods into the ultimate consumers' (Appellees' customers') vehicles.

Petitioners Affidavit previously referred to, demonstrates that the wide range of auto parts installed regularly by Petitioner into the customers' vehicles came from outside the state of Florida; such goods flowed from out of state through the Appellee employers' business (and through the Petitioners hands as he worked) to be used by the owners of the vehicles who were the ultimate consumers. Such is no different than the Appellant in *Alonso*, discussed *supra*, who in the course of rendering pest extermination services utilized "materials and chemicals" that traveled in interstate commerce. *Alonso* , 147 Fed. Appx. at 816. Additionally, it is no different than an elevator operator in *Brennan* who would carry the postmen or deliverymen in order to deliver said mail to the addressed individuals. *Brennan* at 1093. However, it is clear in the instant case that Petitioner had even more involvement in the flow of interstate commerce than the employee in *Alonso* or the elevator operator in *Brennan* given the wide range of out of state parts installed by Petitioner, and the fact that Petitioner picked up those parts at

different locations and delivered them to Appellees' place of business.

The Eleventh Circuit in the case at hand stated that "[t]he automotive parts were removed from the flow of interstate commerce when they arrived at the auto parts stores." *Navarro v. Broney Auto. Repairs, Inc.*, 2008 U.S. App. LEXIS 12346 (11th Cir. Fla. June 6, 2008). This is clearly erroneous as the auto parts stores are not the ultimate consumer, for in order for their business to succeed they must rely upon other companies such as Appellees' business to purchase parts for their business in order to serve their customers. *See, Brennan v. Dillion*, 483 F.2d 1334, 1336 (10th Cir. 1973) (courts have found that apartment house owners are not the ultimate consumer as the "cost is passed on to the tenants and, hence, there is in effect a resale".) *See also, Irby et al. v. Davis*, 311 F.Supp. 577, 580-81 (E.D. Ark. 1970), *citing Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950)(plaintiff employees used nails, steel wire mesh and steel reinforcing bars purchased at a local supplier, and defendant could not argue that the defendant employer was an ultimate consumer as the goods were not in the hands "from whence they will move no farther.") *See also, Tilbury v. Rogers*, 220 F.2d 757 (5th Cir. 1955) (meat butchers of completely *intrastate* meat market are covered under FLSA because scrap sales constituting less that one percent of gross sales eventually moved in interstate commerce). In the instant case, certainly the auto parts installed by Petitioner constituted more than 1 percent of the Appellees' gross income (auto-parts is the heart of Appellees' business). Additionally it is certainly expected that these auto products have not reached their final destination upon receipt of the auto parts

store or Appellees business as the sole purpose of these products is to ultimately place them in the customers vehicle.

The FLSA and the Equal Pay Act are remedial statutes, and Congress, therefore, intended for the federal courts to construe them liberally in their intended beneficiaries favor. *Bence v. Detroit Health Corp.*, 712 F.2d 1024 (6th Cir. 1983), cert. Denied, 465 U.S. 1025 (1984); Also *see Mitchell v. Lublin, McGaughy & Assoc*, 358 U.S. 207 (1959)(within the tests of coverage fashioned by Congress, the [FLSA] has been construed liberally to apply to the furthest reaches consistent with congressional direction.) The FLSA is afforded broad construction in favor of coverage and this liberal construction should be accompanied by reasonableness and common sense. *Dunlop v. Ashy*, 555 F.2d 1228, 1234 (5th Cir. 1977). Although it is clear that "application of the FLSA to [varying] situations is essentially a line-drawing exercise." *Brennan v. Wilson Bldg, Inc.*, 478 F.2d 1090, 1094 (5th Cir. 1973), the Eleventh Circuit in the present case, seems to have drawn their line incorrectly to exclude rather than include coverage under the FLSA. The ramifications of this decision can be far reaching to exclude rather than include coverage under the FLSA. The elevator operators, maintenance employees, janitors and maids referred to in *Brennan* would have all been excluded had the reasoning in the present case been used.

This decision, instead of clarifying coverage under the FLSA as it relates to interstate commerce, has instead muddied the waters. Instead of construing coverage liberally in their intended beneficiaries favor,

the Eleventh Circuit has begun to construe them liberally in favor of non-coverage for the intended beneficiaries.

CONCLUSION

The petition should be granted for the above mentioned reasons.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 08-10618 Non-Argument Calendar
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EUGENIO NAVARRO, Plaintiff-Appellant,

versus

BRONEY AUTOMOTIVE REPAIRS, INC., STEPHEN ROMNEY, TILDEN TOTAL CAR CARE CENTER, ANTHONY BROWN, Defendants-Appellees.

June 6, 2008, Decided
June 6, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For Eugenio Navarro, Appellant: Jamie H. Zidell, J.H. Zidell, P.A., MIAMI BEACH, FL.

For Broney Automotive Repairs, Inc., Stephen Romney, Tilden Total Car Care Center, Anthony Brown, Appellees: Chris Kleppin, Glasser, Boreth & Kleppin, P.A., PLANTATION, FL.

JUDGES: Before MARCUS, WILSON and PRYOR, Circuit Judges.

OPINION

PER CURIAM:

Eugenio Navarro appeals the summary judgment in favor of Broney Automotive Repairs, Stephen Romney, Tilden Total Car Care Center, and Anthony Brown and against Navarro's complaint for unpaid overtime compensation under the Fair Labor Standards Act. See 29 U.S.C. § 207(a)(1). We review a summary judgment de novo. *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1310 (11th Cir. 2007). Navarro argues that he was individually engaged in interstate commerce because the automotive parts that he transported and used to repair vehicles continued to flow in interstate commerce until they reached the customers of Broney Automotive Repairs. We disagree.

Navarro has not established that he was "engaged in commerce" under the Fair Labor Standards Act. 29 U.S.C. § 207(a)(1). To receive overtime compensation, Navarro had to "participat[e] in the actual movement of persons or things in interstate commerce." *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1266 (11th Cir. 2006). Navarro's responsibilities "merely affect[ed]" and did not implicate interstate commerce. Id.

Navarro was hired to collect motor parts that had been ordered by the owners of Broney Automotive from local auto parts stores and to use the parts to repair foreign and domestic vehicles. The automotive parts were removed from the flow of interstate commerce when they arrived at the auto parts stores. See *id.* at 1267 ("When goods reach the customer for whom they were intended, the interstate journey ends . . . ."). The later transport and installation of the parts into the vehicles of Broney's customers by Navarro was purely

intrastate activity and "not covered under the Act." Id.

The summary judgment in favor of Broney Automotive is AFFIRMED.

Filed 1/29/08
CASE NO. 07-21014-CIV-JORDAN
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

EUGENIO NAVARRO, Plaintiff
vs.
BRONEY AUTOMOTIVE REPAIRS, INC., et al,
Defendants

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Mr. Navarro sued Broney Automotive, Stephen Romney, and Anthony Brown pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq.[1]The defendants moved to dismiss for lack of subject-matter jurisdiction, contending that the FLSA does not apply. For the reasons stated below, the defendants' motion to dismiss [D.E. 27], treated as a motion for summary judgment,[2] is GRANTED.

I. FACTUAL BACKGROUND

In deciding the defendants' motion for summary judgment, I draw all facts and reasonable inferences from the evidence of record in favor of Mr. Navarro. See Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285 (11th Cir.1997).

Mr. Navarro filed this action under the FLSA, seeking the payment of overtime compensation. He was employed as a "commercial garage worker" at Broney Automotive from September 15, 2004 to April 12, 2007.

See Aff. of Eugenio Navarro at Par. 3-4. Broney Automotive is an automobile repair shop that has never had gross revenue in excess of $500,000. See Sworn Dec. of Stephen Romney at Par. 3.

As part of his employment, Mr. Navarro was responsible for replacing and installing brakes, belts/hoses, water pump, alternators, starters, and other auto parts on foreign and domestic vehicles. A significant number of these auto parts were manufactured outside of Florida. See Navarro Aff. at Par. 5. Mr. Romney and Mr. Brown - the repair shop's owners - ordered the auto parts from local stores. Mr. Navarro usually had to pick up the parts and take them to the shop to be installed in the customers' cars. See id at Pars. 6 - 9.

Mr. Navarro generally worked 60 hours per week, but was never paid overtime compensation. See id at Pars. 14-16.

II. STANDARD

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party fails to prove an essential element of its case for which it has the burden of proof at trial, summary judgment is warranted. See id at 323. That is, "[w]here the record taken as a whole could not lead a rational trier of fact to

find for the non-moving party, there is no 'genuine issue for trial."' Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 289 (1968)). In making this assessment, the court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party," and "resolve all reasonable doubts about the facts in favor of the nonmovant." See Stewart,117 F.3d at 1285..

III. DISCUSSION

The defendants contend that Mr. Navarro has failed to establish coverage under the FLSA. I agree and conclude that the defendants are entitled to summary judgment.

To establish a claim for overtime compensation under the FLSA, Mr. Navarro has to show that either he was engaged in commerce or in the production of goods for commerce - individual coverage - or that Broney Automotive is an enterprise engaged in commerce or in the production of commerce - enterprise coverage. See 29 U.S.C. § 207(a)(1). See also Thorne v. All Restoration Serv., Inc., 448 F.3d 1264, 1266 (11th Cir. 2006); Alonso v. Garcia, 147 Fed.Appx. 815, 816 (11th Cir, 2005). Mr. Navarro concedes that he cannot prove enterprise coverage because Broney Automotive's gross income during the relevant period is less than $500,000. See PLF Mem. in app. [D.E. 34] at 2-3. See also 29 U.S.C. § 203(s). Given this admission, Mr. Navarro cannot sue under the FLSA unless he can prove that he was individually engaged in commerce as part of his employment duties.

The phrase "engaged in commerce" reflects Congress's intent to regulate "only activities constituting interstate commerce, not activities merely affecting commerce." See Thorne, 448 F.3d at 1266 (citing McLeod v. Threlkeld, 319 U.S. 491, 497 (1943)). As the Supreme Court has stated, Congress did not intend to exercise the full scope of its power under the Commerce Clause in the FLSA. See Walling v. Jacksonville Paper Co., 317 U.S. 564, 570-71 (1943). Therefore, to establish individual coverage, Mr. Navarro must show that he was engaged in "the actual movement of persons or things in interstate commerce." See Thorne, 448 F.3d at 1266. This Mr. Navarro has not done.

Mr. Navarro has not produced any evidence that he used the instrumentalities of interstate commerce in his work. On the contrary, the evidence of record shows that Mr. Navarro's duties are all intra state. He picks up auto parts from local auto part dealers and then installs them in his customers' cars. As the Eleventh Circuit indicated in Thorne, the fact that a number of the auto parts "have crossed state lines at a previous time does not in itself implicate interstate commerce. " 448 F.3 d at 1267.

In Thorne, the employee tried to prove individual FLSA coverage by showing that he regularly purchased goods and materials that came from out-of-state at a local Home Depot. The Eleventh Circuit held that the FLSA did not apply, reasoning that"when goods reach the customer for whom they were intended, the interstate journey ends and employees engaged in any further intra state movement of the goods are not covered under the Act." See id. The

Thorne panel went on to say that a customer who purchases an item from a store is not engaged in commerce even if the store previously purchased the item from out-of-state wholesalers. See id.

The reasoning of Thorne is controlling in this case. Mr. Navarro's in-state purchase and installation of out-of-state parts are insufficient to establish individual coverage. Mr. Navarro contends that in this case the ultimate consumer is the owner of the car not the local dealer. I disagree. When the auto parts are shipped to Florida, the out-of-state shippers do not intend to reach any individual car owner. Rather, the out-of-state shippers send the parts to the local dealer, where they are kept until they are purchased in the local market. Therefore, the interstate journey stops when the parts reached the local dealer. See Thorne, 448 F.3d at 1267.

Alonso is not to the contrary. The Alonso panel concluded that a driver transporting out-of -state goods to his employer's customers was engaged in commerce under the FLSA. It explained that the goods "continued to flow in interstate commerce until they reached" the defendant's customers even if the driver did not have to travel out-of-state. There was no indication, however, that the employer had purchased the goods from an instate third party before they were delivered to the ultimate customer.[3] Here, the parts were sent from the out-of-state wholesaler to the various local dealers, not to Broney Automotive. They were stored by the local dealers until they were purchased by Broney Automotive or other customers. The parts stopped flowing in commerce when they were delivered and stored by the local dealers.

As the Eleventh Circuit stated in Alonso, "application of the FLSA to varying situations is essentially a line-drawing exercise." See 147 Fed.Appx. at 816. Here, the FLSA coverage line is at the point where the parts were delivered and stored by the local dealers. Any intra-state activity after this point is not interstate commerce for purposes of the FLSA.[4]

IV. CONCLUSION

Accordingly, the defendants' motion for summary judgment is GRANTED. A final judgment will be issued separately.

DONE and ORDERED in chambers in Miami, Florida, this 29th day of January, 2005.

Adalberto Jordan
United States District Judge

Footnotes

[1] Mr. Navarro also sued Tilden Total Care Center, but Tilden was never served [D.E. 19].

[2] Generally, "'a claim cannot be dismissed for lack of subject matter jurisdiction because of the absence of a federal cause of action,'" unless "'the federal claim is clearly immaterial or insubstantial.'" See Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir.1990) (internal citations omitted). Where, as here, a factual attack on subject matter jurisdiction also implicates an element of the cause of action, a district court should "find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff s case" under

the Rule 5 6 summary judgment standard. See id whether Mr. Navarro was sufficiently involved in interstate commerce to be covered by the FLSA implicates the elements of Mr. Navarro's claim. As a result, I converted Mr. Navarro's motion to dismiss and reply [D.E. 27, 361 into a motion for summary judgment [D.E. 49].

I gave Mr. Navarro the opportunity to provide any further response to the motion [D.E. 49], but Mr. Navarro did not file any additional document or paper in opposition.

[3] Alonso is a concise unpublished opinion without a factual section. As such, Alonso is not binding precedent. See 11 th Cir. R. 36-2.

[4] I reached the same conclusion in the case of Casanova v. Morales, Case No. 06-21321 (S.D.Fla. August 2, 2007), which involved a similar attempt to establish FLSA individual coverage for the intra-state handling of out-of-state products. The summary judgment in Casanova has been recently affirmed by the Eleventh Circuit. See Casanova v. Morales, Case No, 07-14145 (11th Cir. Jan. 10, 2008), A copy of my order in Casanova and the Eleventh Circuit's opinion are attached to this order.

TAB I

Filed: 8/3/2007

NO. 06-21321-CIV-JORDAN

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION CASE

CARLOS CASANOVA Plaintiff

vs.

JORGE LUIS MORALES Defendant

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Carlos Casanova filed this suit against Jorge Luis Morales pursuant to the Fair Labor Standards Act ("FLSA") 29 U.S.C. §§ 201-216, seeking compensation in connection with a home renovation contract. Pending is Mr. Morales' motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) [D.E. 19], which was by order converted to a motion for summary judgment. [D.E. 22]. Mr. Morales contends that there is no FLSA coverage under the facts presented. Also pending is Mr. Casanova's motion of partial summary judgment [D.E. 35]. Mr. Casanova asserts that he is an "employee," and that Mr. Morales is an "employer," as those terms are defined by the FLSA. According to Mr. Casanova, FLSA coverage exists.

I have considered the motions, the parties' respective memoranda of law, and the relevant portions of the record. For the reasons explained below, Mr. Morales' motion for summary judgment is GRANTED, and Mr. Casanova's motion for partial summary judgment is DENIED.

I. BACKGROUND AND APPLICABLE STANDARDS

Attacks on subject-matter jurisdiction under Rule 12(b)(1) come in two forms: "facial attacks" and "factual attacks." Lawrence v. Dunbar, 919 F.2d 1525, 1528-29 (11 th Cir. 1990). Facial attacks require a district court to determine whether, taking the allegations of the complaint as true, the plaintiff has sufficiently alleged a basis for subject-matter jurisdiction. Id. at 1529 (citations omitted). "'Factual attacks, on the other hand, challenge 'the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered."' Id. Mr. Morales has made a factual attack on subject-matter jurisdiction, arguing that the facts do not support a finding that Mr. Casanova was involved in interstate commerce.

Generally, "'a claim cannot be dismissed for lack of subject matter jurisdiction because of the absence of a federal cause of action,"' unless "'the federal claim is clearly immaterial or insubstantial."' Id. at 1529 (quoting Williamson v. Tucker, 645 F.2d 444, 415-16 (5th Cir. 1981)]. Where, as here, a factual attack on subject matter jurisdiction also implicates an element of the cause of action, a district court should "find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiffs case." Id. Specifically, where jurisdiction is inextricably intertwined with the merits of the lawsuit, a district court "should apply a Rule 56 summary judgment standard." Id. at 1529-30. Whether Mr. Morales was sufficiently involved in interstate commerce to be an "employer" under the FLSA implicates the elements of Mr. Casanova's claim. As a result, I converted Mr.

Morales' motion to dismiss and reply [D.E. 19, 21] into a motion for summary judgment [D.E. 22]. As noted above, Mr. Casanova subsequently filed his own motion for partial summary judgment [D.E. 35].

Summary judgment is granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c). A material fact is on that might affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Where the non-moving party fails to prove an essential element of its case for which it has the burden of proof at trial, summary judgment is warranted. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hutton v. Strickland, 919 F.2d 1531, 1536 (11th Cir. 1990). Mere conclusory allegations or claims asserting legal conclusions are not sufficient. See Bennett v. Parker, 898 F.2d 1530, 1534 (11th Cir. 1990). The task is to determine whether, considering the evidence in the light most favorable to the nonmoving party, there is evidence on which a jury could reasonably find a verdict in his favor. See Anderson, 477 U.S. at 251; Hilburn v. Murata Electronics N. Am., Inc., 181 F.3d 1220, 1225 (11 th Cir. 1999). In making this determination, I must "avoid weighing conflicting evidence or making credibility determinations." Hilburn, 181 F.3d at 1225 (citing Hairston v. Gainesville Sun Publ g Co., 9 F.3d 913, 919 (1 11th Cir. 1994)]. In a case like this one, I view the facts in the light most favorable to Mr. Casanova, and then determine whether, on those facts, either Mr. Morales or Mr. Casanova is entitled to summary judgment on the issue of FLSA coverage. See Garcia v.

Copenhaver, Bell & Associates, M.D.'s, P.A., 104 F.3d 1256, 1261 (11th 1997).

II. FACTS

Each side has submitted affidavits. Those affidavits are summarized below, and where there is a conflict, I describe the facts in the light most favorable to Mr. Casanova.

Mr. Casanova worked for Mr. Morales from March 14, 2006, to May 13, 2006. Mr. Morales hired Mr. Casanova to remodel floors (e.g., take out the old tiles, repair the joints, and raise the existing floor) and remove kitchen cabinets in a residential home in Miami. Mr. Morales agreed to pay Mr. Casanova a flat fee of $5,000 for his services. It is undisputed that Mr. Casanova had been paid $2,500 at the time he stopped working on the project. Mr. Casanova states, however, that he worked an average of 60 hours per week, but was never paid minimum wages, straight time wages, or overtime wages.

Mr. Morales supervised Mr. Casanova's daily work and gave him instructions on a daily basis. Mr. Morales gave Mr. Casanova pre-paid checks to pick up remodeling materials and supplies from Home Depot., and Mr. Casanova made at least four trips to Home Depot. The materials Mr. Casanova picked up from Home Depot included boxes of nails made in China, fastener screws made in China, concrete blocks made in Florida, hardwood and plywood manufactured in Atlanta, and wood for floor joints distributed by Aljoma Lumber, Inc., whose export department covers the Caribbean and Latin America.

There is a dispute as to why Mr. Casanova was terminated. Although it is not relevant for FLSA purposes, I summarize each side's position for the sake of completeness.

Mr. Morales contends that Mr. Casanova had only removed a small portion of the flooring after a month, and then stopped showing up at the home to complete the work. Mr. Morales and his girlfriend, Gloria Contreras, told Mr. Casanova that they could not afford to leave the home vacant any longer, and that they would hire others to complete the work Mr. Casanova had been contracted to do.

Mr. Casanova asserts that Mr. Morales locked him out of the home. Mr. Casanova also says that he tried to call Mr. Morales to see what was going on, but that Mr. Morales never returned his calls.

III. DISCUSSION

An "employer" covered by the FLSA must provide its employees with minimum wage and overtime compensation. See 29 U.S.C. § 206(a)(1). In order to fall under the scope of the FLSA, an "employer" must be engaged in activities that constitute interstate commerce. See 29 U.S.C. § 203(b). To establish the interstate commerce component of an "employer" under the FLSA, an employee must demonstrate "enterprise coverage" or "individual coverage." See, e.g., Dunlop v. Indus. America Corp., 516 F.2d 498, 500-1 (5th Cir. 1975). Here, Mr. Casanova contends that there is "individual coverage" and "enterprise coverage."

A. INDIVIDUAL COVERAGE

To establish individual coverage under the FLSA, an employee must prove that he was (1) engaged in commerce or (2) engaged in the production of goods for commerce. See Thorne v. All Restoration Services, Inc., 448 F.3d 1264 (11 th Cir. 2006). Mr. Casanova relies on the "engaged in commerce" prong.

> An employee is "engaged in commerce" under the FLSA if he directly participates in the actual movement of persons or things in interstate commerce by (1) working for an instrumentality of interstate commerce (i.e., a transportation or communication industry) or (2) by regularly using the instrumentalities of interstate commerce in his work (i.e., regular and recurrent use of interstate telephone, telegraph, mail, or travel).

Silk v. Albino, 2007 wL 853752, *1 (M.D. Fla. March 19, 2007) (citing 29 C.F.R. § 776.2d(d)(2)); 29 C.F.R. § 776.24. See also Thorne, 448 F.3d at 1266. Furthermore, an employee is only "engaged in commerce" if his activities are "so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity." Marshall v. Victoria Transp. Co., Inc., 603 F.3d 1122, 1123 (5th Cir. 1979) (quoting Mitchell v. C. W. Vollmer & Co., 349 U.S. 427, 429 (1955)).

Mr. Casanova was hired to do some remodeling work on a residential home in Miami. He asserts that FLSA coverage exists based on various unpublished decisions which hold there is FLSA coverage if an employee orders, picks up, or uses materials which have traveled

in interstate commerce. See, e.g., Alonso v. Garcia, 2005 wL 1901652, *1 (110, Cir. 2005) (plaintiff, employed by exterminating company, was engaged in commerce "through his duties as a laborer transporting fumigation materials and chemicals, which had traveled in interstate commerce, to defendants' customers within the state," because "the materials and chemicals, which had traveled in interstate commerce, continued to flow in interstate commerce until they reached [the defendants'] customers"); Manzana v. MMLTD, Ltd., Case No. 00-1512-CivJordan (denying summary judgment in FLSA case where employee, who worked as maintenance man in building, used light bulbs and fuses which had traveled in interstate commerce); Munoz v. Tasty Foods Place, Inc., Case No. 00-2046-Civ-Moreno (granting summary judgment on FLSA liability in favor of employee who prepared food for lunch trucks by weighing meats, wrapping food, and bringing finished products to the buyer, because some of the meats, poultry, and supplies that employee handled traveled in interstate commerce).

The problem with Mr. Casanova's argument is that these decisions have been superseded by the Eleventh Circuit's 2006 decision in Thorne. In Thorne, the Eleventh Circuit held that FLSA "individual coverage" did not exist as to an employee who performed mold and water damage restoration work on residential and commercial properties in South Florida, and who also made purchases of goods for his company, including using the company's VISA card two to three times a week to buy gas for trucks, and using the company's Home Depot credit card two to three times a week to purchase goods and materials. See 448 F.3d at 1265 (describing employee's work). The Eleventh Circuit

reasoned as follows. First, "it is the intent of Congress to regulate only activities constituting interstate commerce, not activities merely affecting commerce." Id. at 1266. Second, the employee's use of credit cards did not involve interstate commerce, and even if they did, the employee did not produce any evidence that "he corresponded with merchants outside the state using the mail, phone, or fax, nor did he produce evidence that he made purchases of goods from out-of-state vendors." Id. at 1267. Third, "the fact that some of the tools he purchased may have been crossed state lines at a previous does not in itself implicate interstate commerce. When goods reach the customer for whom they were intended, the interstate journey ends and employees engaged in any further intra state movement of the goods are not covered under the [FLSA]." Id. (citing McLeod v. Threlkeld, 319 U.S. 491, 493 (1943)).

Mr. Casanova is no different from the employee in Thorne. His job was to do some remodeling work at a single residential home in Miami, and that work was purely intrastate. As in Thorne, moreover, Mr. Casanova's purchase of some supplies from Home Depot or other retailers is not enough to provide "individual coverage" under the FLSA. Even though some of those supplies may have traveled in interstate commerce, Mr. Casanova and Mr. Morales were the intended consumers. See Dunlop, 516 F.2d at 499. "[A] customer who purchases an item from Home Depot is not engaged in commerce even if Home Depot previously purchased it from out-of-state wholesalers." Thorne, 448 F.3d at 1264.

To the extent that Mr. Casanova argues that there is

FLSA coverage whenever an employee is involved with alterations to residential buildings, I disagree. First, two of the cases Mr. Casanova relies on -- Brennan v. Hatton, 474 F.2d 8, 11(50, Cir. 1973), and Schultz v. WB. Hartin & Son, Inc., 428 F.2d 186, 189 (4`h Cir. 1970) - are factually distinguishable, as they dealt with contractors engaged in the installation, maintenance, and repair of central heating and air conditioning systems. Second, both Brennan and Schultz addressed 29 U.S.C. § 203(s)(3), a subsection of the FLSA that no longer exists today. See Fair Labor Standards Amendments of 1989, Pub. L. 101-157, § 3(a). Third, the other case Mr. Casanova cites, Reich v. Mashantrakat Sand & Gravel, 95 F.3d 174, 181 (2 na Cir. 1996), is not an FLSA case. Under the facts of this case, the FLSA does not apply. See also Scott v. K. W. Max Investments, Inc., 2007 WL 423080, *2-*3 (M.D. Fla. Feb. b, 2007) (no FLSA "individual coverage" for employee who did remodeling and yard work at a lot and at a house under construction).[1]

B. ENTERPRISE COVERAGE

Under the FLSA, an "enterprise engaged in commerce or the production of goods for commerce" is one that

> (i) has employees engaged in commerce, or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and (ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately states);

29 U.S.C. § 203(s)(1)(A)(i)-(ii).

In his response to Mr. Morales' motion to dismiss, Mr. Casanova argues that "if defendant's gross income met the $500,000 threshold, then enterprise coverage may apply in addition to individual coverage." See Severin v. Pasha's Restaurants, Inc., 2007 wL 967021 *2 (S.D. Fla. 2007) ("The FLSA only protects employees working for enterprises whose annual earnings exceed $500,000."). Mr. Morales replied with an of Ms. Contreras, in which she states that her annual earnings are less than $500,000. Mr. Casanova has not disputed that Ms. Contreras' annual income is less than $500,000, nor has he shown that Mr. Morales' income excess the $500,000 threshold. Instead, Mr. Casanova's response states only that Mr. Casanova "could qualify for individual coverage." Because the minimum sales requirement for enterprise coverage has not been met, summary judgment is appropriate. See Scott, 2007 wL 423080, at *3 (entering summary judgment against employee on FLSA enterprise coverage because employee, who was hired to assist in construction of a house, failed to establish that defendant's gross sales exceeded $500,000).

IV. CONCLUSION

Mr. Casanova has failed to establish coverage under the FLSA. Accordingly, Mr. Morales' motion for summary judgment [D.E. 19] is GRANTED, and Mr. Casanova's motion for partial summary judgment [D.E. 35] is DENIED. All pending motions are DENIED AS MOOT.[2] final judgment will issue separately.

DONE and ORDERED in chambers in Miami, Florida, this 2n' day of August, 2007.

Adalberto Jordan
United States District Judge

Footnotes

[1]Mr. Casanova does not appear to be arguing that he was engaged in the "production of goods for commerce." In any event, I conclude that has also failed to establish that he was engaged in the production of goods for commerce. Mr. Morales does not produce goods for commerce, and Mr. Casanova's duties primarily involved various renovations of one house. See Scott, 2007 WL 423080 *3 (employee was not engaged in the production of goods for commerce because his duties "simply involved assisting in the construction of one house and performing miscellaneous maintenance work on another house").

[2]This includes the recent motion of Mr. Morales' counsel to withdraw.

TAB II

No. 07-14145 Non-Argument Calendar
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARLOS CASANOVA,
Plaintiff-Appellant,

versus

JORGE LUIS MORALES,
Defendant-Appellee.

January 10, 2008, Decided
January 10, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court
for the Southern District of Florida.

JUDGES: Before ANDERSON, BARKETT and HULL, Circuit Judges.

PER CURIAM:

We find no error in the District Court's determination that Carlos Casanova has failed to establish coverage under the Fair Labor Standards Act, 29 U.S.C. §§ 201-216, and thus, the Summary Judgment in favor of Jorge Luis Morales is AFFIRMED.

Filed 1/29/08
CASE NO. 07-21014-CIV-JORDAN
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

EUGENIO NAVARRO, Plaintiff
vs.
BRONEY AUTOMOTIVE REPAIRS, INC., et al,
Defendants

FINAL JUDGMENT

On January 29 2008, summary judgment was granted in favor of defendants Broney Automotive Repairs, Inc., Stephen Romney, and Anthony Brown.

Pursuant to Federal Rules of Civil Procedure 54 and 58, final judgment is entered in favor of the above named defendants. Mr. Navarro shall take nothing by this cause. Appropriate costs, if any, will be taxed by separate motion and order.

Any pending motions are DENIED AS MOOT, and this case is CLOSED.

DONE and ORDERED in chambers in Miami, Florida this 29th day of January, 2005.

Adalberto Jordan
United States District Judge

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No. 08-313

SEP 23 2008

In The

Supreme Court of the United States

EUGENIO NAVARRO,

Petitioner,

v.

BRONEY AUTOMOTIVE REPAIRS, INC., STEPHEN BRONEY, TILDEN TOTAL CAR CARE CENTER, ANTHONY BROWN,

Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Although the Eleventh Circuit decided this case consistent with sixty-five (65) years of jurisprudence regarding individual coverage under the Fair Labor Standards from this Court – the test for such coverage is whether the employee's activities constitute participation in the actual movement of persons or things in interstate commerce, as opposed to "merely affecting" interstate commerce (*e.g.*, *McLeod v. Threlkeld*, 319 U.S. 491 (1943) (holding that the test to establish individual coverage under the FLSA is "not whether the employees activities merely affect or indirectly relate to commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it") and *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943) (holding that "Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states" and did not "exercise in this Act the full scope of the commerce power")) – should this Court grant a *certiorari* petition and enter a ruling inconsistent with its established precedent, or should the Court revisit its established precedent in this area and reverse it (for seemingly no good reason other than to allow the petitioner to recover under the FLSA)?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Broney Automotive Repairs, Inc. does not have a parent corporation or subsidiary corporation and there is no publicly held company that owns 10% or more of its stock. It is a small, family-owned company owned by Respondent Romney.

Respondents Stephen Romney and Anthony Brown live in Broward County, Florida and own and operate a car repair shop, the Respondent Broney Automotive Repairs, Inc.

Respondent Tilden Total Car Care Center was not served in this lawsuit, and is not represented by counsel representing the other Respondents.

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Sup. Ct. R. 10 1

INTRODUCTION

Petitioner has presented no "compelling reason" for his Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Eleventh Circuit's opinion in this case ("Opinion") is in conflict with a decision of this Court, and Petitioner makes no argument that the Eleventh Circuit's decision is in conflict with a decision of another Court of Appeals or that the Eleventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a-c). While the Petition does argue that the Opinion is in conflict with a prior decision of this Court, it is not. *See, e.g.*, *McLeod v. Threlkeld*, 319 U.S. 491, 493-94 (1943); *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-71 (1943); *Kirschbaum Co. v. Walling*, 316 U.S. 522, 523 (1942). *McLeod*, *Jacksonville Paper Co.*, and *Kirschbaum Co.* are a triumvirate of cases that require the conclusion that the Petition is in fact frivolous.

The "Question Presented" section of the Petition suggests that the Opinion's holding uses the wrong test for individual coverage, as the Petition claims that the Opinion, in concluding individual coverage was not applicable to Petitioner, wrongly "conclude[ed] that petitioners [sic] activities merely affected and did not sufficiently affect interstate commerce" under the FLSA, as if that is not the correct legal standard. In the Petition's "Relevant Provisions Involved" section, it quotes the language

from 29 U.S.C. § 207(a)(1) which states that individual coverage exists for employees who are "engaged in commerce".

The Petition's arguments that the Opinion does not cite the correct legal standard are entirely misplaced (and are misleading) because this Court has previously interpreted the "engaged in commerce" language from § 207(a)(1) to mean that employees that are entitled to invoke individual coverage may do so if their work is "in the 'channels of interstate commerce,' *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S. Ct. 332, 335, 87 L.Ed. 460, as distinguished from those who[se work] merely affected that commerce." *McLeod v. Threlkeld*, 319 U.S. 491, 493-94 (1943) (interpreting the phrase "engaged in commerce" to such extent as to be a veritable treatise concerning that phrase contained in § 207(a)(1)). Indeed, *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-71 (1943) (quoting *Kirschbaum Co. v. Walling*, 316 U.S. 522, 523 (1942)), holds that the FLSA does not apply "to business or transactions 'affecting commerce'". This Court in *McLeod* framed the test as follows:

> The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.

McLeod, 319 U.S. at 497. Thus, the Opinion in this case directly followed the language from controlling precedent from this Court. The *McLeod* case is the exact case that the district court relied on in this case. *Navarro v. Broney Automotive Repairs, Inc.*, 533 F.Supp.2d 1223 (S.D. Fla. 2008) (citing *McLeod*, 319 U.S. at 491). The Opinion cites from *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1267-68 (11th Cir. 2006), which cites the same standard and relies on the *McLeod* case for that standard; thus, the Opinion appropriately relies on controlling precedent of this Court. Petitioner does not argue his work was in the channels of commerce, nor could he.

In *McLeod*, this Court noted that the definition of goods contained in § 203(i) specifically "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." *McLeod*, 319 U.S. at 494. Thus, the Court held that therefore "handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are all in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not." *Id.* at 494. This law is nothing new to the Petitioner, as it was relied upon by the district court in this case. *Navarro*, 533 F.Supp.2d at 1223 (citing *McLeod*, 319 U.S. at 491). Thus, it is not clear why this Petition was ever filed in the first instance, since the goods in this case handled by Petitioner were obtained from retailers.

The Petition further argues that "Petitioners [sic] regular job duties, involved the pick-up and delivery of auto-parts [sic] from various auto parts suppliers that were manufactured outside the state of Florida. [Petitioner] also regularly installed those auto-parts [sic] into [Respondent's] customers' vehicles who where [sic] the ultimate consumers." (*Pet.* at 2). The point-heading in the "reasons for granting the Petition" section of the Petition argues that "the interstate journey of goods does not cease to flow in commerce until the goods have reached their final destination and therefore all individuals who handle these goods during flow [sic] through commerce are individually covered". (*Pet.* at 3).

These two arguments are contrary to prior Supreme Court precedent, as stated above, because goods are no longer in the stream of commerce for purposes of individual coverage under the FLSA once the goods wind up in the hands of the local retailer. The ultimate consumer is the Respondent because it bought the auto parts from a local retailer, because this Court has previously held that goods lose their interstate status and are "at rest" by the time the retailer receives them. *McLeod*, 319 U.S. at 494 (acknowledging so); *Brennan v. Wilson Building, Inc.*, 478 F.2d 1090, 1095 (5th Cir. 1973) (interpreting the holding of *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943) to be as follows: "the Court ruled that the interstate journey of the goods did not end, and the goods thus did not cease to flow in commerce, until they reached their final destination – the retail

stores"). Accordingly, contrary to the Petitioner's arguments, precedent going back sixty-five (65) years holds that goods that once may have had an interstate nature lose that status by the time the local retailer receives them. *Id.*; *Navarro v. Broney Automotive Repairs, Inc.*, 533 F.Supp.2d 1223 (S.D. Fla. 2008) (citing *McLeod*, 319 U.S. at 491).

The Petitioner's next argument is that "any regular contact with commerce, even if it is small, will result in an employee being covered by the FLSA. No de minimis rule applies." (*Pet.* at 6) (citing *Marshall v. Victoria Transp. Co.*, 603 F.2d 1122, 1124 (5th Cir. 1979)). That is contrary to this Court's prior precedent, as this Court has specifically held before that individual coverage is applicable only "[i]f a substantial part of an employee's activities related to goods whose movement [was] in the channels of interstate commerce. . . ." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943). Recently, this "substantial part" language has been interpreted by the courts and the Department of Labor to mean that an employee seeking to invoke individual coverage must *regularly and recurrently* be engaged in interstate commerce. *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1266 (11th Cir. 2006) (citing 29 C.F.R. § 776.23(d)(2) & .24).

The Petitioner's next argument is that the FLSA is a remedial statute that is to be construed broadly. It is not clear if the FLSA qualifies as a remedial statute, as it was enacted during the depths of the great depression to give incentive to employers to

spread work around to reduce the unemployment rate. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948) (finding that the FLSA was enacted "to spread employment through inducing employers to shorten hours [for existing workers] because of the pressure of the extra costs [– the payment of overtime – which would require the employer to hire additional workers]."). To the extent that the individual coverage should be construed broadly, it is only to be construed broadly within the test enunciated by this Court as identified herein. Apparently, the Petitioner is seeking this Court to reverse sixty-five (65) years of settled law on this issue, and create a whole new jurisprudential test in pursuance of a general axiom that the Court should construe the statute broadly. The Court should, obviously, reject that invitation, because to entertain it would flummox businesses in their attempts to comply with the FLSA, by changing settled law in such a manner.

The Petitioner sets forth that in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943), this Court stated that "[i]t is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." The Court should note that the *Jacksonville Paper Co.* is referring to the actual channels of commerce, which are not at issue here, as Petitioner did not work in one. That case also held that Congress did not intend to use its full commerce clause power for employees who were neither working in the channels of interstate commerce nor working

with an instrumentality of commerce, but rather Congress "plainly indicated its purpose to leave local business to the protection of the states" and that "Congress did not exercise in this Act the full scope of the commerce power." *Id.* at 570. The *McLeod* decision, as stated above, discusses this concept further, and also holds that Congress did not exercise its full commerce power in enacting the statute. That is why the test for individual coverage requires an employee seeking to invoke it to show that his or her activities did more than just "affect" commerce.

STATEMENT OF THE CASE

On April 16, 2007, Petitioner filed a Complaint in the United States District Court for the Southern District of Florida, bringing one substantive count for overtime, pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (R1). Later, an Amended Complaint was filed. (R20). Discovery ensued, and the Defendants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the Alternative, Request to Convert into Motion for Summary Judgment, when it became clear that no jurisdiction existed in the case. (R27). Shortly thereafter, the Defendants moved to stay the case, because it was evident that there was no subject matter jurisdiction. (R30). The Court granted the Motion for Stay, (R37), but despite the stay, the Petitioner filed his own Motion for Partial Summary Judgment, as to jurisdiction. (R38). Petitioner's counsel filed a similar motion

for summary judgment in another case, *Casanova v. Morales*, 2007 WL 4874773 *1 (S.D. Fla., Aug. 3, 2007), *aff'd*, ___ F.3d ___, 2008 WL 94756 (11th Cir. 2008), which was denied by the same district court judge that decided this case and affirmed by the Eleventh Circuit. The district court converted the motion into a summary judgment motion, and provided the Petitioner with additional time to respond, after the motion was fully briefed, but the Petitioner failed to submit any additional evidence or argument. (R50n.4).

In response to the Defendants' Motion for Summary Judgment, contrary to the testimony in Petitioner's deposition (and argued in the Petition), Petitioner submitted an affidavit in which he averred that he picked up parts from local retail auto parts stores (in his deposition he stated that all he did was install the parts and clean the shop on occasion). (R44). The Court denied the Petitioner's Motion for Partial Summary Judgment, but granted the Respondents' Motion for Summary Judgment, based on the clear binding precedent of *Thorne v. All Restoration Inc.*, 448 F.3d 1261 (11th Cir. 2006), *McLeod v. Threlkeld*, 319 U.S. 491 (1943), and other cases. (R50). Thereafter, the district court entered a Final Judgment in Defendants' favor. (R51). Petitioner's Appeal followed (R52), and the Eleventh Circuit affirmed in an unpublished opinion. *Navarro v. Broney Automotive Repairs, Inc.*, 2008 WL 2315869 (11th Cir., June 6, 2008).

The facts of this case are largely set forth in the published opinion *Navarro v. Broney Automotive Repair, Inc.*, 533 F.Supp.2d 1223 (S.D. Fla. 2008). The corporate Defendant is an automobile repair shop. (R27-4). The business was created in October, 1999. (R27-4). It is a mom-and-pop shop owned by Defendants Stephen Romney and Anthony Brown. (R27-4). Petitioner began working for the Respondents in September, 2004, and continued working there through April 9, 2007. (R27-4). Petitioner was hired as a "helper". (R27-4). Petitioner testified that when he was hired, he understood that his duties were to help work on the cars in any way that he might be asked, such as to exchange an alternator, starter motor, radiator, or transmission. (R27-4). Petitioner basically fixed and replaced parts. (R27-4). Romney described Petitioner's job duties similarly, and testified Petitioner performed oil changes, brake pad changes, took parts off, and put parts back on, "[b]asic stuff, very basic." (R27-4).

Petitioner testified in his deposition that he did not order parts for the business or have any direct dealings with customers. (R27-4). Specifically, Petitioner never received any payments from the customers or in any way dealt with credit cards. (R27-4). If Petitioner worked on a vehicle, and his work required that a new or replacement part be ordered, Petitioner would tell Defendant Bromney, and Bromney would order the part. (R27-4).

Romney orders his parts from Bennett Auto Supply, a local auto parts supplier located at Dixie

highway in Fort Lauderdale. (R27-4). Romney also orders some parts from other automotive retailers, such as Auto Zone, Pines (Auto Parts), and some local dealerships. (R27-4). The parts were always delivered to Romney's shop by the auto parts suppliers, typically within one hour after the order was placed. (R27-5). Petitioner testified very clearly that he worked on the cars in any manner that was asked of him by Mr. Romney and/or Mr. Brown, and he specifically identified replacing alternators, starter engines, radiator, and transmissions. (R36-2). Petitioner testified that sometimes he would diagnose what was wrong with the cars, but that he did not deal with front office paperwork, did not deal with the customers, did not order parts, and did not deal with customers. (R36-2). After listing these duties (and non-duties), Petitioner plainly testified that there were no other tasks that he performed, as follows:

> Q: Other than the job duties that we discussed, are there any other job duties other than, basically, removing parts or replacing parts on the vehicles? Anything else that I'm missing that you did on a daily basis?
>
> A: When there was nothing to do just to clean the area.
>
> * * *
>
> Q: Any other job duties at Broney that we haven't mentioned already that you did other than the cleaning up when there

was slow times, and the fixing and replacing of parts?

A: No.

(R36-2). Nevertheless, despite this clear description of his job duties, Petitioner submitted an affidavit in opposition to Defendants' Motion for Summary Judgment listing other job duties. In his affidavit, Petitioner claims that he went and picked up parts from local auto parts stores. (R35; *Aff. of Navarro* ¶ 9). The district court, believing that picking up the auto parts has no bearing on whether the Petitioner can invoke individual coverage, accepted the testimony, and assumed for purposes of its opinion that the Petitioner picked up parts from the local retailers that the Defendants had purchased, despite a considerable body of precedent that parties are not supposed to submit affidavits inconsistent with their previously given deposition testimony to thwart summary judgment. *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1240 n.7 (11th Cir. 2003).

Plaintiff cannot dispute that the corporate Defendant only earned $277,278 in the tax year October 1, 2005 to September 30, 2006. (R27-4). Additionally, from 2004 – 2007, Plaintiff cannot rebut that the corporate Defendant's gross revenue was under $500,000 annually. (R27-4). In fact, from the last two quarters of 2003 to the present, the corporate Defendant has never had a quarter in which gross revenue exceeded $125,000, and never had four consecutive quarters in which gross revenue exceeded $500,000

annually. (R27-4). These facts made the Petitioner concede below that there was no enterprise coverage, see *Navarro v. Broney Automotive Repairs, Inc.*, 533 F.Supp.2d 1223, 1224 (S.D. Fla. 2008) (noting that "Navarro concedes that he cannot prove enterprise coverage because Broney Automotive's gross income during the relevant period is less than $500,000"), but Petitioner improperly suggests in a footnote that there may be enterprise coverage. (*Pet.* at 3 n.1). Petitioner's concession of this point below makes that issue not appealable. *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1354 (11th Cir. 1998) (holding that points waived below are not appealable).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW WAS DECIDED CONSISTENT WITH ESTABLISHED PRECEDENT OF THIS COURT AND OF THE ELEVENTH CIRCUIT, AND THEREFORE THE PETITION SHOULD BE DENIED.

Section 207(a) of the FLSA provides, in relevant part:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer

> than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). This Court has expressly held that the "engaged in commerce" term in § 207(a)(1) means that to invoke individual coverage an employee must show more than that they merely affect interstate commerce, but rather must show that they significantly affect it, that is, actually be involved in it. *McLeod v. Threlkeld*, 319 U.S. 491, 493-94 (1943) (interpreting the phrase "engaged in commerce" to such extent as to be a veritable treatise concerning that phrase contained in § 207(a)(1)). The *McLeod* case, which was decided shortly after *Walling v. Jacksonville Paper Co.*, requires the conclusion that *certiorari* should not be granted by this Court, as there is nothing for it to decide.

Nevertheless, Respondents will address several arguments made by the Petitioner. Simply put, the FLSA requires an employer to pay overtime at a rate of one and one-half the employee's regular rate for all time worked over 40 hours in a week. These FLSA overtime provisions apply in two circumstances: (1) where an employee is engaged in commerce or the production of goods for commerce – individual coverage; or (2) where an employee works for an enterprise engaged in commerce or in the production of goods for commerce – enterprise coverage. *Ares v. Manuel Diaz Farms, Inc.*, 318 F.3d 1054, 1056 (11th Cir. 2003).

"The burden of proof lies on employees to establish that they were engaged in interstate commerce, or in the production of goods, and that such production was for interstate commerce." *Kitchings v. Florida United Methodist Children's Home, Inc.*, 393 F.Supp.2d 1282, 1292 n.25 (M.D. Fla. 2005) (citing *D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 121 (1946) and *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88, 90 (1942)).

Under the first type of FLSA coverage – "individual coverage" – an employee is entitled to time-and-a-half overtime pay as long as he or she is "engaged in commerce or in the production of goods for commerce." *See* 29 U.S.C. § 207. To determine whether an employee performed such work, a court must focus its inquiry on the activities of the employee and not on the business of the employer. *See Mitchell v. Lublin McGaughy & Assocs.*, 358 U.S. 207, 211 (1959); *see also Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1267-68 (11th Cir. 2006). In *Thorne*, the Eleventh Circuit held that it was "the intent of Congress to regulate only activities constituting interstate commerce, not activities merely affecting commerce", and thus an employee must be "engaged in commerce", which means he must be "directly participating in the actual movement of persons or things in interstate commerce". *Thorne*, 448 F.3d at 1266. Further, in addition to the requirement that the individual must be directly participating in the actual movement of persons or things in interstate commerce, "[f]or an employee to be engaged in commerce,

'a substantial part of the employee's work must be related to interstate commerce.'" *Kitchings*, 393 F.Supp.2d at 1293 n.26 (quoting *Boekemeier v. Fourth Universalist Soc'y in City of New York*, 86 F.Supp.2d 280, 287 (S.D. N.Y. 2000) and (citing *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 572 (1943)).

The second type of FLSA coverage – "enterprise coverage" – does not apply, because, as stated above, the lack of enterprise coverage has been conceded by the Petitioner.

The Petitioner lodges the following arguments concerning why the Opinion should be reversed: 1) the unpublished *Alonso*[1] case, which does not contain a facts section; 2) the term "engaged in commerce" should be given a broad, liberal construction"; 3) the *Marshall* case requires the conclusion that no *de minimis* rule applies; 4) the Petitioner fails to distinguish the *Thorne* or *McLeod* cases, but argues in contravention to them that the ultimate consumers of the retail goods were the Defendants' customers and not the Defendants, and the Petitioner handled and picked up goods that were previously in interstate commerce; and 5) cases from the Tenth Circuit and Eastern District of Arkansas, and the former Fifth Circuit's *Tilbury*[2] case require reversal. The Petitioner's arguments, none of which has any merit, will be discussed in turn.

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[1] *Alonso v. Dolphin Exterminating Co.*, 2005 WL 1901682 (11th Cir. 2005).

[2] *Tilbury v. Mitchell*, 123 F.Supp. 109 (W.D. La. 1954).

The *Alonso* Case is Not Applicable, and Was Overruled by *Thorne*

Petitioner has relied on *Alonso v. Dolphin Exterminating Co.*, 2005 WL 1901682, *1 (11th Cir. 2005), but that decision is not supportive of individual coverage in the circumstances presented by this case. *Alonso* contains no discussion of the facts, much less any analysis of them, whatsoever, but merely holds that a "laborer transporting fumigation materials and chemicals, which had traveled in interstate commerce to defendants' customers within the state", presented an issue of fact preventing summary judgment on the question of whether the plaintiff was engaged in interstate commerce.[3] The Middle District of Florida's

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[3] The *Alonso* opinion, in pertinent part, states as follows, in holding the plaintiff was:

> 'engaged in commerce' through his duties as a laborer transporting fumigation materials and chemicals, which had traveled in interstate commerce to defendants' customers within the state. Although these duties required no transportation outside the state of Florida, the materials and chemicals, which had traveled in interstate commerce, continued to flow in interstate commerce until they reached Dolphin Exterminating Company's customers. *See* [*Brennan v. Wilson Bldg., Inc.*, 478 F.2d 1090 (5th Cir.1973)] at 1095 (holding elevator operators [to be] 'engaged in commerce' because the goods they transported continue to flow in interstate commerce until delivered to the tenants of the building).

Alonso v. Dolphin Exterminating Co., 2005 WL 1901682 (11th Cir. 2005).

decision in *Junkin*[4] explains the problems with *Alonso*, concerning relying on it to argue that it applies to a case where retail goods are handled. The plaintiff in *Junkin* worked for a lawn maintenance company and his work required him to transport herbicides and fertilizers manufactured or shipped out of state. *Junkin*, 2005 WL 2862079 at *1. The court found that there was no enterprise coverage because the employer's annual volume of business did not exceed $500,000, *id.* at *3, and there was no individual coverage because the mere act of transporting goods that previously found themselves in the flow of interstate commerce does not mean that an employee engaged in commerce or produced goods or services for commerce. The court noted that "[b]rought to its logical end, such a theory would mean that an employee who, in the course of his duties, simply moves an item (which originated in another state) from one place to another within the same property . . . has 'engaged in commerce' by 'transporting' that item. Such a theory cannot stand, as it would, in essence, nullify the 'interstate' requirement and ultimately render the Commerce Clause meaningless." *Id.* at *4. As for the persuasiveness or lack thereof of the *Alonso* decision, it was deemed not persuasive because of its failure to provide a factual background and because, "[a]s an unpublished opinion, under Eleventh Circuit Rule 36-2, *Alonso* is not binding precedent and is, at best,

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[4] *Junkin v. Emerald Lawn Maintenance and Landscaping, Inc.*, 2008 WL 2862079 (M.D. Fla. 2005).

persuasive authority.[5] However, given the fact that the court there relied on undisclosed facts in the record, the Court does not find them to be persuasive here." *Id.* at *4 n.6.

Moreover, the Eleventh Circuit's subsequent decision in *Thorne* explaining that activities do not constitute "engaging in commerce" simply because the employer purchased goods which had previously moved in interstate commerce, *Thorne*, 448 F.3d at 1268, completely eclipses the applicability of the reasoning used by the court in *Alonso*. *Thorne's* determination that, "[w]hen goods reach the customer for whom they were intended, the interstate journey ends and employees engaged in any further *intrastate*

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[5] Under Local Rule 36-2, the Eleventh Circuit makes clear that "[u]npublished opinions are not considered binding precedent." 11th Cir. R. 36-2. The Eleventh Circuit clarifies that "[a]lthough unpublished opinions may be cited as persuasive authority, they are not considered binding precedent. *Reliance on unpublished opinions is not favored by the court.*" 11th Cir. R. 36-2, I.O.P.-6 (emphasis added). The Local Rules further explain that "[t]he court may cite [unpublished opinions] where they are specifically relevant to determine whether the predicates for *res judicata*, collateral estoppel, or double jeopardy exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case." 11th Cir. R. 36-2, I.O.P.-7. Thus, the Eleventh Circuit contemplates the limited use of its unpublished opinions for specific cases, but clearly frowns upon reliance on unpublished opinions when they are not "specifically relevant" to a particular case. The Defendants request that the Court find that the *Alonso* opinion is not binding and that it is not persuasive authority, since it has been superseded by *Thorne*. *See Guzman v. Irmadan, Inc.*, 551 F.Supp.2d 1368 (S.D. Fla. 2008) (acknowledging *Thorne* supersedes *Alonso*).

movement of the goods are not covered under the [FLSA]", *id.* at 1267 (emphasis in original), cannot be reconciled with the reported *Alonso* decision; the *Thorne* court clearly distinguished and rejected *Alonso*, to the extent it purports to hold if an employee merely handles goods that at one time traveled interstate that employee is entitled to invoke individual coverage. *See also Russell v. Continental Restaurant, Inc.*, 430 F.Supp.2d 521, 526 (D. Md. 2006) (granting motion to dismiss for lack of subject matter jurisdiction and citing *Thorne* for the proposition that there is no individual coverage for employees "who handle goods after an employer acquires the goods for local disposition"). Even before *Thorne*, other courts had reached the same conclusion. *Brennan v. Wilson Building, Inc.*, 478 F.2d 1090, 1095 (5th Cir. 1973) (citing *Walling v. Jacksonville Paper Co.*, 317 U.S. at 567) (noting that the *Jacksonville Paper* "Court ruled that the interstate journey of the goods did not end, and the goods thus did not cease to flow in commerce until they reached their final destination – the retail stores"); *Rivera v. Heights Landscaping, Inc.*, 2004 WL 434214 *4 (N.D. Ill. 2004) (holding that "'mere use, physical touching, or consumption of goods' that have traveled in interstate commerce is not enough [to establish individual coverage]" and "Plaintiffs cannot establish individual coverage merely by showing that in the course of their work they used rakes, fertilizers, or other goods that originated out of state"). Importantly, *Thorne* relied on *McLeod* for its holding.

Where an employer is the "ultimate consumer" of the goods that have moved in interstate commerce, the journey of those goods through interstate commerce is at an end. The relevant statutory language of the FLSA is as follows:

> (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but *does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof* other than a producer, manufacturer, or processor thereof.

29 U.S.C. § 203(i) (emphasis added). In a case on point, a defendant-employer was found to be the "ultimate consumer" of "the gas and other petroleum products, tires and mechanical parts used in operating and maintaining defendants' trucks and other machines . . . which renders [the employees using those materials and products] excepted from [individual] coverage." *Marshall v. Whitehead*, 463 F.Supp. 1329, 1341 (M.D. Fla. 1978). The *Whitehead* court based its decision on *Dunlop v. Industrial America Corp.*, 516 F.2d 498 (5th Cir. 1975), finding that "the use of such products by the defendants' employees in the course of its business makes the defendants the 'ultimate consumers' of such goods within the meaning of Section 3(i) and renders them excepted from coverage under Section 3(s) on this ground." *Whitehead*, 463 F.Supp. at 1341. In this case, Petitioner

did not pass on (for sale) any oil filters, oil, air filters, and the like to customers of the Respondents. Rather, just as in *Whitehead*, these materials ended their journey through interstate commerce once they reached the Respondents' supplier's place of business (the retailers, such as Bennett Auto). For the reasons addressed herein, the Respondents request that the Court hold that the Petitioner has not met his burden to establish individual coverage, and not grant *certiorari*.

"Engaged in Commerce" Is Somewhat Limited

Under individual coverage jurisprudence, "commerce" and "interstate commerce" are narrower terms of art than in other areas of Commerce Clause jurisprudence. As this Court has clarified, in enacting the FLSA, Congress did not intend to exercise the full extent of its constitutional regulatory powers, and clearly intended to exempt local businesses:

> [W]e cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. [citations omitted]. Moreover as we stated in *Kirschbaum Co. v. Walling* [citations omitted], Congress did not exercise in this Act the full scope of the commerce power.

Walling v. Jacksonville Paper Co., 317 U.S. 564, 571 (1943). Further, because the FLSA manifests the "concern of Congress to avoid undue displacement of

state regulation of activities of a dominantly local character . . . [t]he focus of coverage became 'commerce', not in the broadest constitutional sense, but in the limited sense of Section 3(b) of [the FLSA, 29 U.S.C. § 203(b)]: 'trade, commerce, transportation, transmission, or communication among the several States. . . .'" *Marshall v. Whitehead*, 463 F.Supp. 1329, 1345 (M.D. Fla. 1978) (citing *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 315 (1960)). Further, the following language from this Court shows why workers like the Petitioner who handle goods purchased from a retailer are not "engaged in commerce", and thus are not entitled to invoke individual coverage under the FLSA:

> [i]n the Fair Labor Standards Act, 29 U.S.C.A. s 201 *et seq.*, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. . . . So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not.

McLeod v. Threlkeld, 319 U.S. 491, 493 (1943). The corporate Defendant is a purely local, one-location, mom-and-pop auto repair shop with annual gross sales of less than $500,000. This is exactly the sort of local business Congress, in enacting the FLSA, intended to leave to the regulation of the several states. *Jacksonville Paper Co.,* 317 U.S. at 571.

The *Marshall* Case is Inapposite

The Petitioner relies on *Marshall v. Victoria Transp. Co.*, 603 F.2d 1122 (5th Cir. 1979). That case is not applicable, because the employees were involved in regular and recurrent transportation of individuals engaged in interstate travel, as follows:

> The evidence before the district court clearly established that transporting persons making international journeys was a regular, recurring, and substantial part of the work of defendants' employees in the operation of all of their routes. Because their work was entwined with a continuous stream of international travel, they were engaged in commerce within the meaning of the Act.

Id. at 1125. The court in *Thorne* made clear that employees who purchase goods at a retail store (even if the goods traveled interstate) are not engaged in commerce for purposes of individual coverage (unlike the employees in *Victoria Transp. Co.*), as follows:

> When goods reach the customer for whom they were intended, the interstate journey ends and employees engaged in any further intra state [sic] movement of the goods are not covered under the Act. *McLeod*, 319 U.S. at 493, 63 S. Ct. 1248. Courts distinguish between merchants who bring commerce across state lines for sale and the ultimate consumer, who merely purchases goods that previously moved in interstate commerce for intrastate use. Therefore, a customer who purchases an item from Home Depot is not

> engaged in commerce even if Home Depot previously purchased it from out-of-state workers.

Thorne, 448 F.3d at 1267. This slams the door on any argument by the Petitioner that he was engaged in interstate commerce for purposes of individual coverage. Even if he purchased the items, he still would not be entitled to individual coverage. As the district court explained:

> As the Supreme Court has stated, Congress did not intend to exercise the full scope of its power under the Commerce Clause in [enacting] the FLSA. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-71, 63 S. Ct. 332, 87 L.Ed. 460 (1943). Therefore, to establish individual coverage, [the plaintiff], must show that he was engaged in 'the actual movement of persons or things in interstate commerce.' *See Thorne*, 448 F.3d at 1266.

Navarro, 533 F.Supp.2d at 1223. Accordingly, nothing in *Victoria Transp. Co.* requires the conclusion that reversal is warranted.

The *Thorne* Case is Not Distinguishable

One of the Petitioner's arguments is that in his affidavit he indicates he picked up materials at least once per week at various retail stores. The Petitioner described how these stores were Bennett Auto, Advance Auto, and similar retailers. *Id.* The Plaintiff's argument has been rejected by this Court and the

courts of appeals, as set forth above. The court in *Thorne* made clear that even employees who purchase goods at a retail store (even if the goods traveled interstate) are not engaged in commerce for purposes of individual coverage, as follows:

> When goods reach the customer for whom they were intended, the interstate journey ends and employees engaged in any further intra state [sic] movement of the goods are not covered under the Act. *McLeod*, 319 U.S. at 493, 63 S. Ct. 1248. Courts distinguish between merchants who bring commerce across state lines for sale and the ultimate consumer, who merely purchases goods that previously moved in interstate commerce for intrastate use. Therefore, a customer who purchases an item from Home Depot is not engaged in commerce even if Home Depot previously purchased it from out-of-state workers.

Thorne, 448 F.3d at 1267. This slams the door on any argument by the Petitioner that he was engaged in interstate commerce for purposes of individual coverage. Even if he purchased the items (which he did not), he still would not be entitled to invoke individual coverage. As stated above, the courts have held that the ultimate consumer of the retail goods is the individual who purchases them, and not the individual who happens to own a car or home into which those goods are installed.

The Cases from Other Circuits and *Tilbury* Are Not Controlling

On page 8, the Petitioner cites to a case from the Tenth Circuit and a case from the Eastern District of Arkansas. Those cases do not eclipse the clear line of cases from this Court which set forth the pertinent rubrics concerning individual coverage. The foregoing requires denial of the Petition.

Further, the Petitioner relies on *Tilbury* from the former Fifth Circuit, but that case does not help him for several reasons. First, the *Tilbury* decision notes that workers who unpacked shipments of meat were not engaged in commerce, because "the shipments had completed their interstate journey when they came to rest on defendant's storage room floor". *Tilbury v. Mitchell*, 123 F.Supp. 109, 112 (W.D. La. 1954). Second, the group of employees who the Court found were subject to the FLSA, were butchers and boners who regularly and necessarily in the course of their employment handled or otherwise worked upon these meats which then were immediately placed in interstate commerce, and thus the court held that the employees were "engaged in the production of goods for commerce", which is not an argument that the Petitioner has espoused in this Petition – the Petitioner has argued that he was "engaged in commerce", but not that he was engaged in the production of goods for commerce, and so any such argument to the contrary has been waived by the Petitioner. *Id.*

Concerning the Petitioner's argument that the *de minimis* rule applies, that rule, as explained in *Tilbury*, is that even if the percentage of the employer's business dedicated to the production of goods for commerce is very small (seemingly "*de minimis*"), it is not *de minimis* for purposes of individual coverage, meaning that as long as workers were regularly and recurrently engaged in the production of goods for commerce, the court was not going to hold that such employees were not entitled to individual coverage under the theory that the employer's overall involvement in the production of goods for commerce (because of the nature of its business) was otherwise very low. *Id.* at 112-13. The *Tilbury* decision does not require that the Petition be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should not be granted.

Respectfully submitted,

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